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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1862

JAMES MATHEWS, Warden,
Petitioner,

v.

JEFFREY AMES HUGHES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX AND SYNOPSIS OF PETITION

Page

OPINION BELOW 1

JURISDICTION 2

QUESTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 7

The Court Of Appeals Has Decided An Important State Question In A Way In Conflict With Applicable State Law 7

A. The Court of Appeals has relied erroneously upon decisions of this Court to find unconstitutional an evidentiary rule of the State of Wisconsin 7

B. The decision of the Court of Appeals significantly affects important rules of criminal procedure established by the State of Wisconsin 10

CONCLUSION 11

CASES CITED

Chambers v. Mississippi, 410 U.S. 284 (1973) 7, 9

Page

Curl v. State,
40 Wis.2d 474, 162 N.W.2d 77 (1968) 8

Fisher v. United States,
328 U.S. 463 (1946) 9

Hughes v. State,
68 Wis.2d 159, 227 N.W. 2d 911 (1975) 2

In re Winship,
397 U.S. 358 (1970) 7, 9

King v. State,
75 Wis.2d 26, 248 N.W.2d 458 (1977) 8

Morissette v. United States,
342 U.S. 246 (1952) 7, 9

Mullaney v. Wilbur,
421 U.S. 684 (1975) 7

Patterson v. New York,
____ U.S. ____, 97 S. Ct. 2319 (1977) 9

Washington v. Texas,
388 U.S. 14 (1967) 7, 9

State v. Hebard,
50 Wis.2d 408, 184 N.W.2d 156 (1971) 8

State ex rel. La Follette v. Raskin,
34 Wis.2d 607, 150 N.W. 2d 318 (1967) 10

Page

WISCONSIN STATUTES 1973

sec. 940.01 ..... 3, 5

971.15 ..... 3-4, 5, 8, 10

971.175 ..... 4, 10

OTHER AUTHORITIES CITED

28 U.S.C. sec. 1254(1) 2

28 U.S.C. sec. 2241(a) 2

ALI-M.P.C.
Sec. 4.02(1) 8

United States Constitutional Amendments
Article XIV 3

IN THE

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No. _____

JAMES MATHEWS, Warden,
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v.

JEFFREY AMES HUGHES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari be issued to review the opinion of the Court of Appeals for the Seventh Circuit in the litigation here in question.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals, affirming the mandate of the Federal District Court for the Eastern District of Wisconsin, was filed on May 12, 1978, and is as yet unreported.

The opinion of the Federal District Court for the Eastern District of Wisconsin, the Honorable Myron L. Gordon, District Judge, presiding, granting respondent's petition for a writ of habeas corpus, filed September 1, 1977, is reported at 440 F. Supp. 1272 (E.D. Wis. 1977). A reproduction of both is printed in the Appendix (R. 115, 127).

Prior to seeking habeas relief, the respondent appealed his conviction to the Supreme Court of the State of Wisconsin. The opinion of that Court, reported at 68 Wis. 2d 159, 227 N.W. 2d 911 (1975), affirmed respondent's conviction. It is reproduced in the Appendix hereto (App. 101).

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on May 12, 1978. A timely motion for a stay of the mandate therein was filed and granted. Said stay is scheduled to expire on June 30, 1978, pending filing of the instant petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1). The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. sec. 2241(a).

QUESTION

Whether it is a denial of constitutional due process to establish a state rule of evidentiary law prohibiting introduction of psychiatric testimony on the element of capacity to form intent, when specific intent is an element of the criminal violation charged.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article XIV of the Amendments to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Statutes, 1973:

> **"940.01 First-degree murder.** (1) Whoever causes the death of another human being with intent to kill that person or another shall be sentenced to life imprisonment.
>
> "(2) In this chapter 'intent to kill' means the mental purpose to take the life of another human being."
>
> **"971.15 Mental Responsibility of defendant.** (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

"(2) As used in this chapter, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

"(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence."

"971.175 **Sequential order of proof.** When a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect, there shall be a separation of the issues with a sequential order of proof before the same jury in a continuous trial. The guilt issue shall be heard first and then the issue of the defendant's mental responsibility. The jury shall be informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect. This section does not apply to cases tried before the court without a jury."

STATEMENT OF THE CASE

Jeffrey Ames Hughes, hereinafter referred to as respondent, was found guilty of two counts of murder in the first degree contrary to sec. 940.01, Wisconsin Statutes.

The factual circumstances of the crimes are recounted at length in the opinion of the Wisconsin Supreme Court (App. 101).

Respondent murdered his estranged wife, who was residing with her parents at the time, and a neighbor of his wife's parents. He originally pleaded not guilty and not guilty by reason of insanity, pursuant to sec. 971.15, Wisconsin Statutes. Prior to trial, he withdrew his plea of not guilty by reason of insanity, and proceeded to trial on his plea of not guilty. At trial, he attempted to show that he lacked the requisite intent to commit the crimes by offering the testimony of an expert witness to show that at the time of the murders, he lacked the mental capacity to form that intent. The offer of proof was as follows:

> "If Dr. Kevin Kennedy were called as a witness, the defense would offer that upon being asked the question as to whether or not, based on his conversations with the defendant [respondent] — reviewing all of the personal interviews, court transcripts, jury instructions, and other legal documents, and also being familiar with the laws dealing both with insanity and as to lesser degrees of homicide — he would testify that Jeffrey Hughes, on February 25, 1973, in the early morning hours at the Gross home, would have been unable to form the specific intent to take the lives of either Jacqueline Hughes

> or Louis Kasprzak; and further, he would testify that at the time, he was suffering from a depraved mind and that he was, in forensic psychiatry, termed an antisocial personality or a psychopath, and that an abnormal mental condition prevented him from forming the specific intent to kill."

Pursuant to a long line of decisions rendered by the Supreme Court of the State of Wisconsin, the trial court refused to allow admission of the testimony. At the close of testimony, the trial court instructed the jury that a person is presumed to intend the natural and probable consequences of his acts. Respondent was ultimately convicted of both counts and sentenced to two consecutive life terms. On appeal, the Supreme Court of the State of Wisconsin affirmed the decision of the trial court denying admission of the psychological testimony, based on its own long line of precedential cases (App. 101).

Respondent then petitioned the Federal District Court for a writ of habeas corpus. The District Court granted the petition on the ground that refusal to admit psychological testimony on the question of mental capacity to form the intent to kill, coupled with the instruction on presumption of intent, created an irrebutable presumption, thus relieving the prosecution of the burden of proving beyond a reasonable doubt the intent element of the criminal violation, in contravention of respondent's right to due process (App. 115).

Petitioner sought and obtained a stay of the mandate, which requires retrial of the respondent, pending appeal to the Seventh Circuit Court of Appeals, which stay was granted. Upon appeal, the Seventh Circuit Court of Appeals affirmed the mandate of the Federal District Court (App. 127). The opinion of the Seventh Circuit

indicates, just as did the opinion of the District Court, that the Wisconsin exclusionary rule, coupled with the instruction on presumption of intent, created an irrebutable presumption in violation of respondent's due process rights, relying on this Court's opinions in *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Morissette v. United States*, 342 U.S. 246 (1952). The opinion further reflects the Seventh Circuit's determination that, even in the absence of the instruction on presumption of intent, the application of the exclusionary rule by itself is violative of constitutional due process in that it precludes a defendant from presenting testimony in his own behalf to refute a necessary element of the crime charged, relying on this Court's opinions in *Washington v. Texas*, 388 U.S. 14 (1967) and *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Petitioner seeks this Court's writ of certiorari to review the resolution by the Seventh Circuit Court of Appeals of respondent's claims relating to lack of due process of law.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Has Decided An Important State Question In A Way In Conflict With Applicable State Law.

A. The Court of Appeals has relied erroneously upon decisions of this Court to find unconstitutional an evidentiary rule of the State of Wisconsin.

The State of Wisconsin has determined that psychiatric testimony on the issue of mental capacity to form specific intent to engage in criminal activity is inadmissible. The deliberate design of the legislature to adopt this policy is evident from the fact that nearly all of the relevant

portions of the American Law Institute Model Penal Code were adopted by this State with the significant exception of that section specifically sanctioning admissibility.[1]

The Supreme Court of the State of Wisconsin has explained this rule in a number of decisions, one of the more recent of which affirmed respondent's conviction (App. 101). According to the State Supreme Court, the exclusionary rule reflects the decision of the legislature not to allow an accused to escape responsibility for his actions upon proof of any different degree or type of mental disease or defect apart from that which must be shown in order to establish an insanity defense, as embodied in sec. 971.15, Wisconsin Statutes, *Curl v. State*, 40 Wis. 2d 474, 484-486, 162 N.W. 2d 77 (1968); *State v. Hebard*, 50 Wis. 2d 408, 184 N.W. 2d 156 (1971).

In determining that Wisconsin's exclusionary rule, coupled with the instruction on presumption of intent, relieved the prosecution of its burden to prove a necessary element of a criminal violation, the Seventh Circuit Court of Appeals failed to recognize the fact that there are alternative methods by which an accused might disprove intent. For example, the accused might urge that the criminal violation occurred because of error, mistake, or accident, in which instance psychological testimony might be admissible as relevant character evidence, *King v. State*, 75 Wis. 2d 26, 248 N.W. 2d 458 (1977). Thus,

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[1] Section 4.02 ALI-M.P.C.:

> "(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

Wisconsin has not relieved the prosecution of proving all elements of a crime beyond a reasonable doubt, in contravention of this Court's decision in *In re Winship, supra*, but has merely refused to recognize one method by which the accused could relieve himself of culpability. Reliance by the Court of Appeals on this Court's decision in *Morissette v. United States, supra*, is also inappropriate, since in that factual circumstance, the trial court took it upon itself to eliminate the element of guilty intent altogether from the criminal violation involved, which certainly is not the situation herein.

The Court of Appeals went beyond the factual circumstances of the instant case to hold that even if the instruction on presumption of intent is not delivered, the exclusionary rule by itself is unconstitutional because it deprives an accused of the opportunity to present evidence in his own behalf. However, it is respectfully submitted that this Court has never gone so far as to require a State to recognize a particular defense that it had not previously recognized. Rather this Court has been cognizant of the right of the States to formulate the elements of the activities which it considers to be criminal in nature and to determine what defenses shall be available to those charged with criminal violations. This was made patently clear in this Court's recent decision in *Patterson v. New York*, _____ U.S. _____, 97 S. Ct. 2319 (1977). By requiring the State of Wisconsin, in essence, to recognize a defense of diminished responsibility, the Court of Appeals has extended the reach of *Chambers v. Mississippi, supra*, and *Washington v. Texas, supra*, beyond their intended boundaries.

This Court has not spoken directly to the issue involved here. However, in the case of *Fisher v. United States*, 328 U.S. 463 (1946), this Court considered the question whether constitutional imperatives demand that a

defendant be allowed to raise a defense implicating mental defects apart from legal insanity in a jurisdiction which does not recognize defenses based thereon. It was stated in that case that, in the absence of constitutional limitation, the administration of the criminal law is a matter of local concern, and therefore this Court would not force the local jurisdiction to adopt a defense it did not then recognize. Such variation between the opinion of the Seventh Circuit Court of Appeals and the opinion of this Court is deserving of review.

B. The decision of the Court of Appeals significantly affects important rules of criminal procedure established by the State of Wisconsin.

Wisconsin presently follows a bifurcated trial procedure, pursuant to sec. 971.175, Wisconsin Statutes, when an accused enters the two pleas of not guilty and not guilty by reason of insanity. As the District Court recognized, implementation of its mandate, as affirmed by the Court of Appeals, will require far-reaching alterations in that system. The bifurcated trial system was established in order to protect the criminal defendant's right to avoid self-incrimination, *State ex rel. La Follette v. Raskin*, 34 Wis.2d 607, 150 N.W. 2d 318 (1967). The mandate of which petitioner seeks review may eliminate the viability of the bifurcated trial altogether. Depending on the nature of the expert testimony ultimately determined to be admissible on the question of mental capacity to form the requisite intent, and the relationship or similarity of such testimony to the standards required to establish an insanity defense, as delineated in sec. 971.15, Wisconsin Statutes, the bifurcated trial system may be completely unworkable in light of the decision of the Seventh Circuit.

Such a significant alteration in state criminal procedure required pursuant to federal court holdings should be reviewed by this Court.

CONCLUSION

For the foregoing reasons it is respectfullly urged that a writ of certiorari should issue from this Court to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Page

DECISION OF WISCONSIN
SUPREME COURT
68 Wis.2d 159, 227 N.W. 2d 911 (1975) 101-114

DECISION OF THE UNITED
STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
404 F. Supp. 1272 (E.D. Wis. 1977) 115-126

DECISION OF THE SEVENTH
CIRCUIT COURT OF APPEALS
Dated May 12, 1978 127-143

HUGHES, Plaintiff in error,
V. STATE, Defendant in error.
68 Wis.2d 159, 227 N.W.2d 911 (1975)

No. State 179. Argued April 10, 1975. –
Decided April 21, 1975.
(Also reported in 227 N.W. 2d 911.)

ERROR to review a judgment and orders of the circuit court for Milwaukee county: JOHN G. BARTHOLOMEW, Circuit Judge of the Eighth Judicial Circuit, Presiding. *Affirmed.*

Jeffrey Ames Hughes, plaintiff in error (hereinafter defendant), was convicted of the first-degree murders of his wife, Jacqueline Hughes, and Louis Kasprzak. He was tried before a jury, found guilty and sentenced to two life terms to run consecutively.

The defendant and his wife had separated and on February 24, 1973, Jacqueline Hughes, and their daughter, Michelle, were staying at the home of her parents, Mr. and Mrs. Robert Gross, on West Rae Avenue in Milwaukee, Wisconsin. The defendant was to have visitation with his daughter the next day. He telephoned twice during the evening of February 24th and, during the second call, requested to talk to Michelle, but his request was denied. Mr. Gross left for work before 11 p.m. and Jacqueline, Michelle and Mrs. Gross went to bed around 10:30 p.m. Mrs. Gross woke up about two hours later when she heard glass shattering in the kitchen. Jacqueline ran into her bedroom saying that "Jeff is here."

As Mrs. Gross attempted to call police, the defendant entered the bedroom and pushed her away from the

phone. The defendant told Mrs. Gross to go to the basement saying that if the police arrived he would have a gun. Jacqueline was in the defendant's headlock as the three went to the basement. In the basement, Mrs. Gross saw a box of shotgun shells in the defendant's hand. Mrs. Gross escaped from the basement as Michelle began to come down the stairs. She ran to her neighbors, Mr. and Mrs. Louis Kasprzak.

Mrs. Gross told the Kasprzaks that the defendant had broken into her house. Mr. Kasprzak said he would go next door and try to calm the defendant. Mrs. Kasprzak called the police and Mr. Gross. After Kasprzak had left to go next door, Mrs. Gross heard a loud noise which she thought was a shot and heard the same noise again a short time later.

Officers Michael Cournia and Donald Blank of the Milwaukee police department responded to the call for assistance. They entered the rear door of the Gross home which was broken and smashed. Officer Cournia saw the defendant sitting on a couch in the living room with Michelle on his lap. The defendant said "They're downstairs." Officer Cournia saw Mrs. Hughes lying at the bottom of the stairs with her head propped against the wall. She appeared to be dead. Louis Kasprzak was lying near her with a large wound to his forehead above the bridge of his nose. A shotgun was on the floor.

Mr. Kasprzak was rushed to the hospital, but died there. The cause of his death was a shotgun wound to the head resulting in a massive facial wound. Mrs. Hughes' death was caused by two gunshot wounds to the neck.

Mr. Gross testified that no shotgun shells were kept in his house. His guns were kept in a locked cabinet in the basement. Mrs. Gross testified that the gun case was

locked and undamaged when she went to the basement with the defendant. It was found later to have been broken into.

After discovering what had happened upon his returning home, Mr. Gross asked the defendant: "Jeff, how could you?" The defendant replied: "You're a murderer, just like I am." There was testimony that the defendant had a good relationship with Louis Kasprzak prior to the shooting.

Prior to trial, the defendant was examined twice to determine his competency. Just before the trial, the defendant withdrew his plea of not guilty by reason of mental disease or defect. During the trial, the trial court ruled the defendant could not introduce evidence to the effect that due to an abnormal mental condition, he was prevented from forming the specific intent to kill. Defendant then rested his case without presenting any evidence. The trial court also refused a request to modify the standard Wisconsin jury instruction on what constitutes a "depraved mind" in submitting the lesser-included offense of second-degree murder.

Following the judgment of conviction and the sentencing, the defendant moved for a new trial and to modify his sentence. The motions were denied.

Writs of error were issued by this court to review the judgment of conviction and the orders denying a new trial and modification of sentence.

For the plaintiff in error there was a brief and oral argument by *Howard B. Eisenberg*, state public defender.

For the defendant in error the cause was argued by *David J. Becker*, assistant attorney general, with whom on the brief was *Bronson C. La Follette*, attorney general.

HANLEY, J. Three issues are presented for review.

1. Was it error for the trial court to refuse to admit the testimony of a psychiatrist that an abnormal mental condition prevented the defendant from forming the specific intent to kill?

2. Was it prejudicial error for the trial court to refuse to modify the standard jury instruction on the meaning of "depraved mind?"

3. Was the imposition of consecutive life sentences for the two counts of first-degree murder an abuse of discretion by the trial court?

Psychiatrist's testimony on intent.

Following the close of its case, the state made a motion to limit and prohibit the defense from introducing testimony from Dr. Kevin Kennedy, a psychiatrist, on an abnormal mental condition preventing the defendant from forming the specific intent to kill. Defense counsel made an offer of proof, stating:

> "If Dr. Kevin Kennedy were called as a witness, the defense would offer that upon being asked the question as to whether or not, based on his conversations with the defendant—reviewing all of the personal interviews, court transcripts, jury instructions, and other legal documents, and also being familiar with the laws dealing both with insanity and as to lesser degrees of homicide—he would

> testify that Jeffrey Hughes, on February 25, 1973, in the early morning hours at the Gross home, would have been unable to form the specific intent to take the lives of either Jacqueline Hughes or Louis Kasprzak; and further, he would testify that at the time, he was suffering from a depraved mind and that he was, in forensic psychiatry, termed an antisocial personality or a psychopath, and that an abnormal mental condition prevented him from forming the specific intent to kill."

Here, the defendant urges that it was error for the trial court to refuse to admit the psychiatrist's testimony as to defendant's intent. It is argued that such testimony is relevant evidence to rebut the presumption that a person intends the natural and probable consequences of his acts and is, therefore, relevant because specific intent to kill is an element of the offense of first-degree murder under sec. 940.01, Stats.

Defendant's position was expressly disavowed in *Curl v. State* (1968), 40 Wis. 2d 474, 162 N.W. 2d 77, certiorari denied, 394 U.S. 1004, 89 Sup. Ct. 1601, 22 L. Ed. 2d 781. There the defendant demanded and received a bifurcated trial and attempted to offer evidence that he had been earlier treated at mental hospitals at the guilt portion of his trial. In agreeing with the trial court that such evidence was not material on the issues of intoxication and intent, this court said:

> "Actually, what defense counsel appears to be contending is that, even if not insane and even if accountable for his actions, under the law a person by reason of a personality disorder, may be

more prone to become intoxicated or less able to form an intent to commit a crime. He cites an 1898 decision in this court,[1] stressing the terms 'abnormal mental condition' and 'disordered mental condition however produced,' as requiring trial courts to establish and consider the psychopathology of legally sane persons in determining the fact of intoxication or the fact of intent. . . . If there can be found in the 1898 decision the suggestion that the personality dysfunction or dyscontrol, short of psychosis or insanity, is a relevant factor in the determination of guilt, we expressly disavow it. . . . Judge and jury ought not be required to identify, classify and evaluate all categories and classifications of human behavior beyond the establishing of the fact of sanity." (40 Wis. 2d at 484, 485)

The decision in *Curl v. State, supra,* was followed in *State v. Hebard* (1971), 50 Wis. 2d 408, 420, 421, 184 N.W. 2d 156, where this court stated:

"In accepting the establishment of insanity as the measuring stick for accountability for one's action, this court declined the invitation to permit the sociopath or emotionally disturbed individual, legally sane by the applicable test, to escape being held accountable for criminal acts by pleading or establishing an impairment of the capacity to

[1] *Hempton v. State* (1901), 111 Wis. 127, 86 N.W. 596.

form intent, except on the issue of insanity and in the insanity phase of the trial where the trial is bifurcated. . . ."

In *State v. Anderson* (1971), 51 Wis. 2d 557, 564, 187 N.W. 2d 335, this court noted that a sequential order of proof is mandatory under sec. 971.175, Stats., and that testimony of the mental condition of the defendant is not admissible on the question of intent.

In *Muench v. State* (1973), 60 Wis. 2d 386, 210 N.W. 2d 716, the defendant entered a single plea of not guilty, after being committed to Central State Hospital and found competent to proceed to trial. One of the arguments made before this court was that it was error for the trial court to sustain an objection to a psychiatrist's testimony as to the question of intent. An offer of proof was made that the psychiatrist would testify that the defendant had been diagnosed as an inadequate personality. This argument was rejected by this court.

"If a person is to be found incapable of forming the necessary criminal intent because of mental disease or deficiency such defense must be pursued by a plea of not guilty because of mental disease or deficiency and established in a bifurcated trial." (60 Wis. 2d at 395)

The defendant in this case withdrew his plea of not guilty because of mental disease or deficiency. Under the recent decisions of this court by doing so he was not entitled to present testimony as to his mental condition on the issue of his intent at the time of the shooting. Therefore, it was not error for the trial court to refuse to permit the testimony of the psychiatrist.

Jury instruction.

Error is claimed in the trial court's refusal to give requested additions to the standard jury instruction on what constitutes a "depraved mind" as an element of second-degree murder under sec. 940.02, Stats. The court instructed the jury in this regard as follows:

> "The second element of this offense requires that the defendant's conduct was of such a character that it evinced a 'depraved mind regardless of human life.' 'Depraved mind regardless of human life' does not mean that the mind of the defendant must have been diseased or that he must have had a mental disorder generally described as insanity or feeble-mindedness. The depravity of mind referred to in second-degree murder exists when the conduct causing death demonstrates an utter lack of concern for the life and safety of another and for which conduct there is no justification or excuse.
>
> "You will observe that the difference between murder in the first degree and murder in the second degree, as herein defined, consists in this: in murder in the first degree, it is the killing of a human being with an intent, that is, a mental purpose to kill, while in murder in the second degree, it is not necessary that there be an intent to cause the death of the person killed, or of any human being, but it is sufficient if such death is caused by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life."

The defendant requested, in writing, that the instruction be modified to incorporate the definition of "depraved mind" given by this court in *State v. Weso* (1973), 60 Wis. 2d 404, 409, 412, 210 N.W. 2d 442.

In that case, the element of a "depraved mind" was fully discussed. It was noted that a depraved mind must be indifferent to the life of others and that mere negligence or recklessness alone is not sufficient. (60 Wis. 2d at 410)

> "To constitute a depraved mind, more than a high degree of negligence or recklessness must exist. The mind must not only disregard the safety of another but be devoid of regard for the life of another. . . . Certainly a depraved mind is not the normal state of mind of a reasonable person. A depraved mind lacks a moral sense, an appreciation of life, is unreasonable and lacks judgment. A depraved mind has a general intent to do the acts and the consciousness of the nature of the acts and possible result but lacks the specific intent to do this harm." (60 Wis. 2d at 411, 412)

Based on this case, the defendant submitted the following two amendments to the standard instruction. The first is:

> ". . . To constitute a depraved mind, more than a high degree of negligence or recklessness must exist. The mind must not only disregard the safety of another, but be devoid of regard for the life of another. The element of disregard for life,

> likewise calls for a state of mind which has no regard for the moral or social duties of a human being. A depraved mind has a general intent to do the acts and the consciousness of the nature of the acts and possible result but lacks the specific intent to do the harm, in this case, to cause death. . . ."

The second requested amendment is:

> ". . . While a depraved mind may co-exist with a premeditated design and while it may be characterized as a mind which may be inflamed by passion to such a degree that it ceases to care for human life and safety, it is to be distinguished from the mental state required in first degree murder in that a depraved mind has a general intent to do the acts and it has a consciousness of the nature of the acts and the possible results, but it lacks the specific intent to take life."

The defendant asserts that the trial court's refusal to give either of these requested amendments to the standard instruction was an abuse of discretion. We do not agree. *Weso* does not purport to make any change in the law with respect to the element of a "depraved mind" as found in various criminal statutes. *Weso* did not hold that the present standard instruction on second-degree murder, particularly that part of the instruction regarding a "depraved mind," was either unclear or inadequate.

Even if there were merit to defendant's contention that the trial court abused its discretion in refusing to give the proposed amendments to the standard instruction there would still be no basis for reversal of the judgment of conviction. Sec. 274.37, Stats., provides, in part, as follows:

> "No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury . . . unless in the opinion of the court to which application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial."

The instruction given informed the jury that a "depraved mind" involves an utter lack of concern for the life and safety of another for which there is no justification or excuse and that the difference between first- and second-degree murder is that first-degree murder involves intent to kill and second-degree murder does not involve this element. Under the circumstances there is no showing that the error complained of has affected the substantial rights of the defendant.

Sentencing.

The defendant was sentenced to two consecutive life terms and argues that the imposition of the sentences consecutively was an abuse of discretion.

Under sec. 940.01, Stats., a life sentence is mandatory where a defendant is found guilty of first-degree murder. Sec. 973.15(1), Stats., allows for the imposition of consecutive sentences:

> ". . . The court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent or that it shall commence at the expiration of any other sentence."

Because the defendant was convicted of two counts of first-degree murder, the question is whether the trial court abused its discretion in making the two sentences consecutive. *See State v. Dean* (1975), 67 Wis. 2d 513, 227 N.W. 2d 712.

Defendant's counsel here notes that:

> "A person convicted of first-degree murder is eligible for parole in approximately twelve years. Thus by imposing consecutive sentences the circuit court has precluded this defendant from even being considered for parole until almost the year 2000."

A similar point was raised and dismissed by this court in *State v. Wells* (1971), 51 Wis. 2d 477, 488, 187 N.W. 2d 328, certiorari denied, 406 U.S. 907, 92 Sup. Ct. 1614, 31 L. Ed. 2d 817, where defendant was sentenced to an indeterminate term of not more than thirty years on an armed robbery charge and a consecutive life sentence for first-degree murder.

The defendant also contends that this was one criminal episode and therefore, consecutive sentences are inappropriate. This argument was recently rejected in *Ruff v. State* (1974), 65 Wis. 2d 713, 727, 728, 223 N.W. 2d 446.

> ". . . Defendant contends that the trial court erred in imposing consecutive sentences because the three crimes involved were part of the same 'criminal episode.' The reference to a single 'episode' comes from guidelines for the exercise of the sentencing power, not adopted in this state, but, even in a comment to the American Bar Association suggested standards, we find the reference to a 'criminal episode' to relate to the situation where a defendant is charged with multiple crimes for just one act, and not to where different acts have resulted in multiple charges, one for each act. Defendant's contention that he is being punished three times for carrying a weapon on the night in question will not hold water. . . ."

Here, the defendant was charged with the independent acts of killing his wife, Jacqueline Hughes, and Louis Kasprzak.

It is also argued that the defendant's prior record and the nature of the crimes do not justify the imposition of consecutive sentences. This court is reluctant to interfere with the trial court's area of discretion as to sentencing. *State v. Wells, supra.* Consecutive sentences were imposed in *Tucker v. State* (1973), 56 Wis. 2d 728, 738, 202 N.W. 2d 897, where this court said:

> "Factors relevant to the appropriateness of the sentence imposed clearly include: the gravity or seriousness of the offense, the nature of the conduct involved, and the consequential injuries inflicted upon another person."

The protection of the public is also an appropriate consideration, *Moore v. State* (1972), 55 Wis. 2d 1, 197 N.W. 2d 820, as is the viciousness or aggravated nature of the crime. *State v. Tew* (1972), 54 Wis. 2d 361, 195 N.W. 2d 615.

In determining the appropriate sentence in this case and in explaining its reasons for imposing the consecutive sentences it did, the trial court did review the factors stated in the above-cited authorities. The trial court concluded that "the defendant does show an exceptional risk to the public" and, therefore, imposed consecutive sentences.

We conclude that there was no abuse of discretion in making the sentences consecutive. The nature and character of the crime demonstrated that the defendant was an exceptional risk to the public. The killings were an extreme over reaction to a slight provocation.

By the Court. –Judgment and orders affirmed.

440 F. Supp. 1272 (E.D. Wis. 1977)
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

76– C– 626

JEFFREY AMES HUGHES,
Petitioner,

v.

JAMES MATHEWS, Warden,
Respondent.

DECISION and ORDER

In this habeas corpus action, the petitioner challenges the constitutionality of the Wisconsin supreme court's ruling that a legally sane defendant charged with first degree murder may not introduce evidence of his diminished mental state at the time of the alleged criminal act to prove his incapacity to form a specific intent to kill. Hughes v. State, 68 Wis.2d 159, 227 N.W.2d 911 (1975). I find that the petition must be granted.

The controlling facts are not in dispute. The petitioner was convicted of two counts of first degree murder after a jury trial in the circuit court for Milwaukee County and was sentenced to two consecutive terms of life imprisonment. The murders culminated a period of marital strife between the petitioner and his estranged wife, one of the two murder victims. The second victim was a neighbor who attempted to restrain the petitioner during the fatal confrontation. A full description of the event is set forth in detail in Hughes V. State, supra.

The petitioner's initial pleas were not guilty and not guilty by reason of mental disease or defect, pursuant to Wis. Stat. § 971.06(d). However, after reviewing the report of a psychiatrist appointed by the court to examine the petitioner, Mr. Hughes withdrew his plea of not guilty by reason of mental disease or defect and proceeded only on a plea of not guilty. At a pretrial conference, the petitioner's counsel stated that it was the defendant's theory that he could only be guilty of second degree murder because he had lacked the specific intent required for a first degree murder conviction. A determination was made that the petitioner was competent to stand trial, and a jury trial occurred in March, 1974.

At the trial, the defense did not present any witnesses to contest the state's evidence concerning the petitioner's actions on the night in question. As its sole witness, the defense called a psychiatrist to testify concerning the petitioner's mental state at the time of the criminal acts. The trial court granted a motion by the prosecution to exclude the psychiatrist's testimony based on the decisions of the Wisconsin supreme court in Sprague v. State, 52 Wis.2d 89, 187 N.W.2d 784 (1971), and Curl v. State, 40 Wis.2d 474, 162 N.W.2d 77 (1968). The petitioner's counsel then made the following offer of proof regarding the psychiatrist's proposed testimony: that Mr. Hughes

> ". . . was suffering from a depraved mind and that he was, in forensic psychiatry, termed an antisocial personality or a psychopath, and that an abnormal mental condition prevented him from forming the specific intent to kill."

The petitioner rested without offering any other evidence. The case went to the jury with instructions on both first and second degree murder. The jury returned with guilty verdicts on two counts of first degree murder.

The Wisconsin supreme court affirmed both the judgment of conviction and the trial court's order denying the petitioner's post-trial motions. Hughes v. State, *supra.*

The petitioner claims here that the trial court's exclusion of the proferred [*sic*] psychiatric testimony violated his fourteenth amendment due process right to rebut the presumption that he intended to kill his victims. Had he chosen to plead not guilty by reason of mental illness, he could have offered such proof, under the state's bifurcated system, at a second phase of the trial. The issue here is whether in the absence of an insanity plea the state may constitutionally deny him the right to offer such evidence at the trial wherein the jury is instructed that the defendant is presumed to have intended the natural and probable consequences of his acts.

I. THE WISCONSIN LAW ON INSANITY AND INTENT

Under Wisconsin's bifurcated trial system, a defendant charged with murder may raise the defense of insanity by pleading "not guilty by reason of mental disease or defect" pursuant to Wis. Stat. § 971.06(d). Such a plea may be joined with a general plea of "not guilty." *Id.* When a case in which both pleas have been joined goes to trial, it is tried in two phases. In the first phase, the issue of guilt is tried; in the second phase, it is determined whether the defendant was legally insane at

the time of the offense and should therefore be excused from responsibility although guilty of the offense. See Wis. Stat. § 971.175; State ex rel. La Follette v. Raskin, 34 Wis.2d 607, 150 N.W.2d 318 (1967); State v. Shoffner, 31 Wis.2d 412, 143 N.W.2d 458 (1966). In the latter case, the technique of employing the American Law Institute's standards on insanity was coupled with the placing of the burden of proof on the question of insanity upon the defendant. This was labelled as "an experiment in this perplexing field." 31 Wis.2d at p. 925.

In its disposition of Mr. Hughes' appeal, the Wisconsin supreme court reaffirmed a line of decisions holding that psychiatric testimony concerning a defendant's capacity to form a criminal intent is admissible *only* in support of the plea of not guilty by reason of mental disease or defect; i.e. only during the second phase of the bifurcated trial. Muench v. State, 60 Wis.2d 386, 395, 210 N.W.2d 716 (1973); State v. Anderson, 51 Wis.2d 557, 564, 187 N.W. 2d 335 (1971); State v. Hebard, 50 Wis.2d 408, 184 N.W.2d 156 (1971); Curl v. State, 40 Wis.2d 474, 162 N.W.2d 77, cert. denied, 394 U.S. 1004 (1969).

The policy underlying the exclusion of such evidence was explained in State v. Hebard, supra, at 420-21, as follows:

> "In accepting the establishment of insanity as the measuring stick for accountability for one's action, this court declined the invitation to permit the sociopath or emotionally disturbed individual, legally sane by the applicable test, to escape being held accountable for criminal acts by pleading or establishing an impairment of the capacity to form

> intent, except on the issue of insanity and in the insanity phase of the trial where the trial is bifurcated. . . ."

In Curl v. State, supra, at 484, 85, the court stated:

> "Judge and jury ought not be required to identify, classify and evaluate all categories and classifications of human behavior beyond the establishing of the fact of insanity."

These decisions are based on a determination by the Wisconsin court that, as a matter of policy, only a defendant who challenges his legal sanity is to be permitted to rebut the presumption that one intends the natural consequences of his acts, and this can only be done at the second phase of the bifurcated trial. This viewpoint has been asserted in six cases (including the one at bar) by a unanimous state supreme court. With a full awareness of this well-established state policy, I nevertheless find it necessary to hold that such policy determination does not withstand constitutional scrutiny.

II. PROOF OF SPECIFIC INTENT

In In re Winship, 397 U.S. 358, 364 (1970), the United States Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." Accord, Patterson v. New York, 45 U.S.L.W. 4708 (1977). The petitioner claims to have been convicted in violation of this constitutional precept. He cogently urges that by erecting a presumption which, in effect, is conclusive that all legally sane persons have the capacity to form an

intent to kill, the Wisconsin supreme court has relieved the state of its burden to prove a fact necessary for a first degree murder conviction: specific intent to kill.

First degree murder, for which the punishment is life imprisonment, is defined in Wis. Stat. § 940.01(1) as "caus[ing] the death of another human being with intent to kill that person or another. . . ." Intent to kill is defined in Wis. Stat. § 940.01(2) as "the mental purpose to take the life of another human being" and is often referred to in decisions of the Wisconsin supreme court as "specific intent to kill." See e.g. Holmes v. State, 63 Wis.2d 389, 399, 217 N.W.2d 657, 663 (1974).

Second degree murder, which is punishable by imprisonment of not less than 5 nor more than 25 years, is defined in Wis. Stat. § 940.02 as "caus[ing] the death of another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life. . . ."

The Wisconsin legislature has reserved conviction of first degree murder and the severe punishment of life imprisonment only for those murders accomplished with a specific intent to kill. Neither intent to kill nor intent to do harm constitute elements of the offense of second degreee murder, since § 940.02 "does not require the existence of any particular state of mind in the actor at the time of the crime. . . ." Wagner v. State, 76 Wis.2d 30, 48 (1977). Thus, where the critical issue in a murder case is whether the defendant committed first or second degree murder, the focus of the trial is upon the only distinction between those two crimes — the actor's state of mind. It is elementary that the prosecution has the burden of proving that the actor had the specific intent to kill.

The prosecution's burden of establishing this crucial element of specific intent is eased by the rebuttable presumption that a person intends the natural and probable consequences of his acts. Gibson v. State, 55 Wis.2d 110, 115, 197 N.W.2d 813 (1972); State v. Wells, 51 Wis.2d 477, 483-84, 187 N.W.2d 328 (1971), cert. denied 406 U.S. 907 (1972). The jury at the petitioner's trial was advised as to this presumption by the following portion from Wis. Crim. Jury Instruction 1100:

> "When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his deliberate acts." (Tr. 1119).

The petitioner sought to rebut this presumption by introducing expert psychiatric testimony to show that at the time of the crime he was unable to form the specific intent to take the lives of his victims. Supported by the consistent holdings of the Wisconsin supreme court cited above, the trial court rejected such proposed testimony.

The combined effect of the jury instruction on presumed intent and the exclusion of evidence to prove mental incapacity to form specific intent resulted in a conclusive presumption violative of the Fourteenth Amendment's due process clause. Morissette v. United States, 342 U.S. 246 (1952).

The prosecution might not be able to prove that a defendant acted with specific intent to kill if the defendant could introduce proof to establish that he did not possess the capacity to form such intent. The jury instruction on presumed intent erects a presumption that the defendant *intended* the natural and probable

consequences of his acts. Since all defendants in Wisconsin who are determined to be legally sane are prohibited from rebutting this presumed capacity to form an intent to kill, the presumption becomes conclusive. This relieves the state of its responsibility to prove one of the crucial facts necessary for a first degree murder conviction. I hold that this procedure inescapably comes into conflict with In re Winship.

The conclusive presumption facing the petitioner in this case is closely analogous to the one found to be violative of due process in *Morissette*, 342 U.S. 246 (1952). There the defendant was charged with "unlawfully, wilfully and knowingly" stealing spent bomb casings from a United States government bombing range. At trial, the defendant testified that he thought the casings had been abandoned and that he did not intend to steal them or take them with criminal intent. The trial court refused to allow closing argument or jury instruction on this defense theory, ruling that felonious intent could be presumed by the defendant's act of taking the spent casings.

The United States Supreme Court reversed, reasoning as follows:

> "We think presumptive intent has no place in this case. *A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.* A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit. Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L.Ed. 1519." 342 U.S. at 273-75. (Emphasis added).

I believe that this reasoning is directly applicable to the presumption in the case at bar that all legally sane defendants have the capacity to form the intent to kill. The prosecution's evidence that the petitioner shot and killed two persons does not automatically establish that the petitioner did so with the mental purpose to take the lives of his two victims, as required for a first degree murder conviction. The proof of the petitioner's act of shooting his victims is given the artificial effect of establishing the requisite specific intent and overrides the petitioner's presumed innocence of first degree murder.

I agree with the Arizona supreme court's holding in State v. Shaw, 106 Ariz. 103, 471 P.2d 715, 724-25 (1970), that *Morissette* bars a bifurcated trial procedure wherein a defendant is precluded from introducing evidence to rebut intent during the guilt phase of the proceedings. In *Shaw*, at 475 P.2d p. 724, the Arizona supreme court observed:

> "Can this Court say that it is just to pass upon the guilt and innocence of a defendant without allowing all of the evidence available to determine whether he had the mental capacity to commit the crime? . . . To prohibit the introduction of any or all the evidence bearing on proof of insanity at the trial of guilt or innocence would deprive a defendant of the opportunity of rebutting intent, premeditation, and malice, because an insane person could have none. The first trial then would involve only proof that an act of a criminal nature had been committed, and that the defendant committed it. In effect, this gives rise to a presumption of intent, premeditation, or malice which runs counter to the common-law and constitutional concepts of criminal law. The second trial is limited solely to the question of legal insanity, the guilt of the defendant having already been determined. There is no provision, nor realistically could there be, to determine also intent, premeditation, or malice in reduction of the degree of the crime. Thus, the presumption raised in the first trial becomes an irrebuttable presumption."

The respondent relies primarily on Fisher v. United States, 328 U.S. 403 (1946), a case in which the Supreme Court interpreted the local homicide statutes of the District of Columbia. In *Fisher*, the defendant was charged with first degree murder, which, in the District of Columbia, required proof of deliberation and premeditation. The defendant, although legally sane,

was permitted to introduce evidence of his mental deficiencies which he claimed made him incapable of premeditation and deliberation. However, the trial court refused an instruction that the jury could consider the defendant's personality traits in determining his capacity to form the requisite intent.

The Supreme Court affirmed the defendant's conviction. The Court stated that "[t]he administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern. . . ." *Fisher*, supra, at 476, and refused to disturb the trial court's construction of the District of Columbia law concerning the defense's theory on the issue of criminal intent.

It is significant, however, that the defendant in *Fisher* did not assert a constitutional right to the jury instruction he sought; rather, the defendant's arguments appear to have been grounded on the law of the District of Columbia and other states. Thus, the Supreme Court was not faced with the constitutional argument advanced in the case at bar. I believe that the decision was limited by the due process analysis in the later Supreme Court cases of *Morissette* and *In re Winship*.

This order intrudes upon the established policy of the State of Wisconsin, and it requires changes in a program adopted by the state legislature and buttressed by several deliberated holdings of the state supreme court. Accordingly, if the respondent desires to appeal this order, a stay for that purpose will be granted.

Therefore, IT IS ORDERED that the petition for a writ of habeas corpus be and hereby is granted, unless within 60 days the state of Wisconsin notifies the petitioner and this court of its intention to retry the

defendant. In the latter event, the issuance of the writ will be permanently stayed provided such trial is actually commenced within 90 days after such notice.

Dated at Milwaukee, Wisconsin, this 1st day of September, 1977.

/s/ Myron L. Gordon
U.S. District Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-2010

JEFFREY AMES HUGHES,

Petitioner-Appellee,

v.

JAMES MATTHEWS, Warden,

Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 76-C-626
Myron L. Gordon, *Judge.*

ARGUED JANUARY 24, 1978—DECIDED MAY 12, 1978

Before CASTLE, *Senior Circuit Judge*, SWYGERT and WOOD, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* This appeal from the granting of a writ of habeas corpus to a state prisoner presents the general problem of integrating the disciplines of law and psychiatry in a usable, if not precise, manner. The particular questions to be resolved are: (1) whether a rebuttable presumption that a person intends the probable consequences of his acts coupled with an exclusion of all psychiatric evidence offered to show lack of capacity to form intent, unconstitutionally relieves the prosecution of proving the intent element of the crime; and (2) whether an evidentiary rule excluding psychiatric testimony on the issue of specific intent, by itself, is impermissible. Finding that both questions must be answered in the positive, we affirm.

I.

The facts are stated in detail in the Wisconsin Supreme Court opinion, *Hughes v. State*, 68 Wis. 2d 159, 277 N.W.2d 911 (1975), and will be briefly summarized here. After a period of marital difficulties, petitioner and his wife, Jacquelin Hughes, entered into a formal separation agreement and divorce proceedings were commenced. In the early morning hours of February 25, 1973, following a telephone argument regarding petitioner's scheduled visitation with his five-year-old daughter, petitioner broke into the house of his wife's parents, Mr. and Mrs. Gross, where his wife and daughter were staying. Mrs. Gross escaped to the home of a neighbor and telephoned Mr. Gross, who was at work, and the police. After the neighbor, Mr. Kasprzak, went to the Gross house to attempt to calm the petitioner, Mrs. Gross heard two loud noises. When the police arrived, they found petitioner with his daughter in the living room and Mrs. Hughes and Mr. Kasprzak dead of gunshot wounds in the basement.

Petitioner was charged with two counts of first-degree murder and, under Wisconsin's bifurcated trial system, he pleaded not guilty and not guilty by reason of mental disease or defect.[1] Prior to the trial, petitioner was examined by court-appointed psychiatrists. Upon receiving the psychiatric report, petitioner withdrew his plea of not guilty by reason of mental disease or defect and proceeded only upon the not guilty plea. As explained by his counsel at the pretrial conference, it was petitioner's theory of defense that he lacked the requisite specific intent for first-degree murder and was guilty only of second-degree murder.[2] (Tr. 25, 71.) At trial, after the close of the state's case, petitioner called a psychiatrist to testify regarding petitioner's mental state at the time of the act. The trial court granted the prosecutor's motion to exclude the psychiatrist's testimony and the defense made the following offer of proof:

> If Dr. Kevin Kennedy were called as a witness . . . he would testify that at the time, [defendant] was suffering from a depraved mind and that he was, in forensic psychiatry, termed an antisocial personality or a psychopath, and that an abnormal mental condition prevented him from forming the specific intent to kill.

(Tr. 548-549.) The defense offered no other evidence and, after being given instructions, including one regarding the legal presumption of intent, the jury found the petitioner guilty on both counts. The court imposed two consecutive life sentences.

The Wisconsin Supreme Court subsequently affirmed petitioner's conviction. *Hughes v. State*, *supra*. The Wisconsin opinion, in relevant part, rejected petitioner's argument that since specific intent is an element of first-degree murder, psychiatric evidence must be admitted to enable a defendant to rebut the legal presumption that a person intends the natural and probable consequences of his acts. In so deciding, the Wisconsin

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[1] Wis. Stats. § 971.175 (1975):

971.175 Sequential order of proof. When a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect, there shall be a separation of the issues with a sequential order of proof before the same jury in a continuous trial. The guilt issue shall be heard first and then the issue of the defendant's mental responsibility. The jury shall be informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect. This section does not apply to cases tried before the court without a jury.

[2] Wis. Stats. § 940.01 (1975):

940.01 First-degree murder. (1) Whoever causes the death of another human being with intent to kill that person or another shall be sentenced to life imprisonment. (2). In this chapter "intent to kill" means the mental purpose to take the life of another human being.

Wis. Stats. § 940.02 (1975):

970.02 Second-degree murder. Whoever causes the death of another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life, may be imprisoned not less than 5 nor more than 25 years.

Supreme Court cited several of its prior decisions[3] which held that psychiatric evidence was admissible only on the issue of insanity.

Petitioner then filed for a writ of habeas corpus in federal district court under 28 U.S.C. § 2254. After examining established Wisconsin policy against admitting psychiatric evidence on intent, the district court granted the writ. *Hughes v. Mattheus*, 440 F.Supp. 1272 (E.D. Wis. 1977). The state brought this appeal.

II.

We begin by examining several aspects of Wisconsin law relevant to our inquiry. First, Wisconsin statutes provide for first- and second-degree murder[4] which are distinguished only by the degree of intent required for conviction. One who causes the death of another by conduct "evincing a depraved mind" is guilty only of second-degree murder since he

> has a general intent to do the acts and the consciousness of the nature of the acts and possible result but lacks the specific intent to do the harm.

State v. Weso, 60 Wis.2d 404, 411-12, 210 N.W.2d 442, 446 (1973). *See also Wagner v. State*, 76 Wis.2d 30, 48, 250 N.W.2d 331, 341 (1977) (intent to kill is not an element of second-degree murder).

Second, Wisconsin has established a rebuttable presumption of intent: "[t]he law presumes a person intends the natural and probable consequences of his own acts but the presumption may be rebutted." *State v. Carlson*,

[3] The court cited *Muench v. State*, 60 Wis. 2d 386, 210 N.W.2d 716 (1973); *State v. Anderson*, 51 Wis. 2d 557, 187 N.W.2d 335 (1971); *State v. Hebard*, 50 Wis. 2d 408, 184 N.W.2d 156 (1971); *Curl v. State*, 40 Wis. 2d 474, 162 N.W.2d 77 (1968), *cert. denied* 394 U.S. 1004 (1969).

[4] The texts of both §§ 940.01 (first-degree murder) and 940.02 (second-degree murder) are set forth in note 2 *supra*. Wisconsin also provides for third-degree murder where the homicide is committed during a felony. Wis. Stats. § 940.03 (1975).

5 Wis.2d 595, 604, 93 N.W.2d 354, 359 (1958).[5] *See also State v. Wells*, 51 Wis.2d 477, 483-84, 187 N.W.2d 328, 331 (1971), *cert. denied*, 406 U.S. 907 (1972). In the present case, the state trial court instructed the jury on the presumption of intent: "when there are no circumstances to prevent or rebut the presumption, the legal and natural presumption is that death was intended." (Wis. J.I.-Crim. 1100.)

Finally, as noted above, Wisconsin provides for a bifurcated trial system when a defendant pleads not guilty and not guilty by reason of mental disease or defect.[6] This section effectuates Wis. Stats. § 971.15 (1975) which establishes and defines the insanity defense in accordance with §§ 4.01 and 4.03 of the American Law Institute's Model Penal Code (ALI-MPC).[7] Significantly, ALI-MPC § 4.02, which specifically provides for ad-

[5] In *Carlson*, the defendant's conviction of arson and third-degree murder was affirmed since the Wisconsin Supreme Court found no error in excluding medical testimony of an organic brain abnormality. That testimony by itself, the court stated, suggested no reason why the defendant could not form intent to commit the crime nor rebutted the presumption of intent. 5 Wis.2d at 607, 93 N.W.2d at 360. In the present case, the trial court excluded the proffered evidence, and the State Supreme Court upheld the exclusion, without a preliminary finding that the testimony would not be helpful in determining whether the petitioner had the capacity to form specific intent. A bona fide finding that the particular psychiatric evidence was not helpful might have made the exclusion permissible. *See* note 24, *infra*.

[6] See Wis. Stats. § 971.175 (1975) which is set out in note 1 *supra*. This section codifies the rule of *State ex rel. LaFollette v. Raskin*, 34 Wis.2d 607, 150 N.W.2d 318 (1967) and represents the latest stage of Wisconsin's long history of experimentation with the concept of trying the issues in sequence when an insanity plea is coupled with a plea of not guilty. *See* Note, *Criminal Law—First Degree Murder—Evidence of Diminished Capacity Inadmissible To Show Lack Of Intent*, 1976 Wis. L. Rev. 623, 634-35 [hereinafter cited as Wisconsin Note].

[7] Wis. Stats. § 971.15 (1975) provides:

> **971.15 Mental responsibility of defendant.**
> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate

(Footnote continued on following page)

missibility of evidence regarding mental disability whenever such evidence was relevant to the state of mind element of the offense, was not enacted by the Wisconsin legislature. The rejection of § 4.02, the mandatory language of § 971.175 regarding the sequential order of proof, and several public policy considerations, led the Wisconsin Supreme Court to refuse to admit psychiatric testimony on the issue of intent during the guilt portion of a bifurcated trial. *See Sprague v. State*, 52 Wis.2d 89, 187 N.W.2d 784 (1971) *and* cases cited note 3 *supra*. This rule excluding psychiatric evidence on the issue of intent was extended to single stage trials, where no insanity defense was raised, in *Muench v. State*, *supra* note 3, and was reaffirmed in *Hughes v. State*, *supra*.[8]

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[7] *continued*

the wrongfulness of his conduct or conform his conduct to the requirements of law.

(2) As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

[8] It is interesting to note that the first of the five Wisconsin Supreme Court cases preceding the present case, *Curl v. State*, *supra* note 3, overruled *Hempton v. State*, 111 Wis. 127, 135, 86 N.W. 596, 598 (1901) which expressly found evidence of an abnormal mental condition to be "material upon the general issue of not guilty."

We also note, by way of clarification, that petitioner here is seeking to introduce psychiatric testimony to support his theory of "diminished capacity" to form specific intent rather than to support a defense of "diminished responsibility." *See* Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 827 (1977) [hereinafter cited as Arenella]. Although the title of the above article characterizes diminished capacity as a "defense," we view the petitioner's attempts here as being directed toward disproving an element of the crime of first-degree murder.

III.

Given this factual and state law background, we consider first the validity of Wisconsin's instruction on presuming intent where the presumption cannot be rebutted by psychiatric evidence that the defendant lacked specific intent. The Supreme Court has held that all elements of a crime must be proven by the prosecution beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). *See also Mullaney v. Wilbur*, 421 U.S. 684 (1975) (state must prove criminal intent to convict defendant of murder). A conclusive presumption which relieves the state of its duty to prove all elements of the crime beyond a reasonable doubt is, therefore, unconstitutional. *See Morrissette v. United States*, 342 U.S. 246, 275 (1952).

In Wisconsin, specific intent to kill is an element of first-degree murder and is the sole factor which distinguishes that crime from second-degree murder. The district court reasoned that by instructing the jury that all persons are presumed to have intended the consequences of their acts unless facts or circumstances rebut the presumption and then prohibiting the petitioner from presenting those facts, Wisconsin constructed an irrebuttable presumption of intent which improperly relieved the prosecution of the burden of proving that element of the crime. *Hughes v. Matthews*, *supra* at 1275.

In response, the State argues that the petitioner was free to rebut the presumption by introducing other evidence, such as that showing mistake or accident, which would negate specific intent. The State, citing *Patterson v. New York*, 432 U.S. 197 (1977) and *Leland v. Oregon*, 343 U.S. 790 (1952), maintains that it has merely chosen not to recognize the defense of lack of capacity to intend which is within its legitimate power over the criminal process. However, these cases are clearly inapplicable since they merely recognize the right of the state to shift the burden of persuasion to the defendant on affirmative defenses to crimes. Specific intent to kill is an "element" of first-degree murder in Wisconsin, *Wagner v. State*, *supra*, and is not a "defense" to the crime. While a state has the power, within constitutional limits, to define its crimes as it wishes, once

it has stated what combination of factors constitutes a crime it must prove each of them beyond a reasonable doubt.[9] Thus, the district court was correct in holding that by instructing the jury to presume intent if not rebutted, and by excluding psychiatric evidence offered to rebut the presumption, Wisconsin set up a conclusive presumption which unconstitutionally relieved the prosecution of the burden of proving the element of specific intent beyond a reasonable doubt.

IV.

Were this simply a case where a jury instruction on presuming intent improperly left the jury with the impression that the petitioner had the burden of persuasion to disprove an element of the crime, we would be satisfied to affirm the writ of habeas corpus and send the case back to the state courts for a new trial with directions to avoid the suspect instructions.[10] However, the constitutional error present in the Wisconsin procedure is not merely the result of a rebuttable presumption becoming improperly conclusive when combined with a valid exclusionary rule. The exclusion of psychiatric evidence offered to show that the petitioner

[9] We note that there are semantical difficulties in distinguishing between what is an element and what is a defense. The Supreme Court in *Patterson v. New York*, *supra*, discussed the problem of states defining their crimes in such a way as to relabel facts which were historically "elements" so that they become "defenses" which must be proved by the defendant. *Id.* at 210. In the present action, while terming the lack of capacity to intend a "defense," the state does not dispute its obligation to prove intent. Thus, this case is not as close as *Patterson v. New York*, *supra*. It is true that by showing lack of capacity to have specific intent, petitioner would be presenting what is referred to as a "defense." However, what he actually is doing is attempting to disprove an element of the crime, not prove a defense. The propriety of excluding the petitioner's evidence will be examined in Part IV, *infra*.

[10] Indeed, the State has advised us that the Wisconsin Uniform Criminal Jury Instructions Committee has adopted a new instruction regarding the intent element of first-degree murder and other intent cases designed to avoid the presumption. App. 122.

lacked the capacity to form specific intent to kill the two victims, is, by itself, constitutionally infirm.

While a conclusive presumption which establishes an element of the crime is considered violative of due process because it relieves the prosecution of the burden of proving each element beyond a reasonable doubt, *In re Winship*, *supra*, the right of a defendant to present evidence is a right which has independent status under the sixth and fourteenth amendments.[11] *Washington v. Texas*, 388 U.S. 14, 18-19 (1967) (state defendant has sixth amendment right to obtain witnesses); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (strict application of state evidentiary rules to exclude defendant's evidence violated due process). In *Chambers*, the Court declared:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Id. at 294. *See also Webb v. Texas*, 409 U.S. 95, 98 (1972) (trial judge's intimidating remarks drove defense witness off the stand and thereby violated defendant's due process rights).[12]

[11] It can also be argued that the right of a defendant to present evidence is a corollary of the right to have all elements of the crime proven by the prosecution. This follows since, presumably, the more favorable evidence an accused presents to the court, the more difficult is the prosecution's task of proving guilt beyond a reasonable doubt.

[12] The State relies on *Fisher v. United States*, 328 U.S. 463 (1946) which held that the defendant in a first-degree murder case was not entitled to an instruction, under Washington, D.C. law, that the jury should consider his abnormal personality in determining intent and premeditation. We agree with the district court and the D.C. Circuit that *Fisher* did not deal with the constitutional question involved here. *See United States v. Brawner*, 471 F.2d 969, 999-1002 (1972). Also, in contrast to the present case, the defendant in *Fisher* was permitted to introduce all psychiatric testimony he offered. 328 U.S. at 467.

A defendant's right to present evidence is violated where "the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by the defendant." *Washington v. Texas, supra* at 25 (Harlan, J., concurring). *See also People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53, 62-63, *cert. denied*, 338 U.S. 856 (1949). Consequently, in deciding whether this due process standard was met in petitioner's trial, we will first determine whether the evidence offered by the defense is relevant; second, determine whether the evidence is competent; and third, if the evidence is found to be both relevant and competent, examine the reasons for the rule excluding the evidence to determine if the rule is arbitrary.[13]

A. Relevance of Psychiatric Testimony.

First we must determine if the psychiatric evidence offered is relevant at a first-degree murder trial in Wisconsin. Under Wisconsin law, Wis. Stats. § 904.01 (1975), relevant evidence is both material and probative. That is, evidence is relevant when it pertains to a fact in issue and has a tendency to prove or disprove that fact.[14]

[13] Given the state's power over its criminal process, we look to state law to determine the relevance and competence of the evidence. *See Irvine v. California*, 347 U.S. 128, 134 (1953). However, just as a state may not exclude relevant and competent evidence arbitrarily, it may not arbitrarily classify evidence to be irrelevant or incompetent. *Cf. Patterson v. New York, supra* at 210.

In *Washington v. Texas, supra*, the Supreme Court mentioned several state rules which presumably would meet the constitutional test. For example, state rules may exclude relevant and competent evidence if the exclusion is based upon nonarbitrary considerations such as with the testimonial privileges of lawyer-client and husband-wife. 388 U.S. at 23 n.21. Also, rules which exclude relevant evidence which is not competent are permissible; *i.e.*, rules disqualifying witnesses who are infants or otherwise mentally or physically incapable of observation and testimony. *Id.*

[14] We note that the prosecutor here conceded the relevance of the psychiatric testimony in his argument to the trial court in support of excluding the evidence:

(Footnote continued on following page)

Since the degree of intent is particularly in issue when distinguishing between first- and second-degree murder in Wisconsin, one would assume that psychiatric testimony regarding petitioner's mental state would pertain to and have some bearing on the resolution of the issue.[15] We note first that while Wisconsin has held that proof of insanity is not proof that defendant lacks the capacity to intend, *State v. Hebard, supra* note 3 at 420, 184 N.W.2d at 163, it would be consistent to admit that psychiatric evidence which does not prove insanity might raise a reasonable doubt as to whether a defendant did or could form specific as opposed to general intent.[16] In addition, we note that Wisconsin has viewed psychiatric testimony to be "highly relevant" on the issue of competency to stand trial under Wis. Stats. § 971.14 (1975), *State ex rel. Haskins v. Dodge County Court*, 62 Wis.2d 250, 266, 214 N.W.2d 575, 583 (1974), and relevant on the issue of intent to kill. *King v. State*,

[14] *continued*

> We do not dispute in any way that perhaps expert testimony on the question of mental responsibility would have been or would be of assistance in resolving the subjective question. . . .

(Tr. 540-41.) While we find this concession to be an indication of state law, we feel compelled to analyze the relevancy question in greater detail to ascertain Wisconsin law.

[15] Psychiatric testimony has been considered relevant to the issue of intent by this and other circuits. *E.g., United States v. Staggs*, 553 F.2d 1073, 1076 (7th Cir. 1977); *United States v. Demma*, 523 F.2d 981, 986-87 (9th Cir. 1975) (en banc); *United States v. Brawner, supra* note 12 at 999. *See also Patterson v. New York, supra* at 206.

[16] In *State v. Hebard*, the Wisconsin Supreme Court criticized *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715, 721 (1970), for holding unconstitutional the Arizona bifurcated trial system which was similar to that in Wisconsin. Specifically, *Hebard* disagreed with the Arizona Court's conclusion that an insane individual would not be able to form intent. *State v. Hebard, supra* note 3 at 420, 184 N.W.2d at 162. This criticism does not logically preclude Wisconsin from admitting that psychiatric evidence pertains to the issue of a defendant's state of mind.

75 Wis. 2d 26, 43, 248 N.W.2d 458, 467 (1977).[17] Thus, we conclude that in Wisconsin psychiatric testimony is relevant evidence on issues regarding a defendant's mental state including the question of whether the defendant had the capacity to form specific as opposed to general intent.[18]

B. Competence of Psychiatric Testimony.

The second inquiry is whether psychiatric testimony is competent evidence in Wisconsin. Assuming the individual qualifications of the psychiatrist were proper, we believe the question of competence involved in this case is whether Wisconsin recognizes psychiatric testimony as trustworthy evidence of mental state. *See generally* McCormick On Evidence, §§ 61-71 (2d ed. 1972).

The State argues that the Wisconsin Supreme Court and the state legislature have expressed their distrust of psychiatric evidence and prohibited its admissibility on the issue of intent. *See, e.g., Curl v. State, supra* note 3 and the rejection of ALI-MPC § 4.02 noted in Part II of this opinion. *Curl v. State, supra,* stated that the reason

[17] The State suggests *King* did not present the same issue we confront in this case since there the defendant was permitted to introduce psychiatric testimony of his non-agressiveness toward others as character evidence to support his theory of accident. While the distinction between permitting psychiatric testimony as character evidence and excluding the same testimony on the issue of mental state is subtle at best, we agree that *King* is not alone dispositive of the relevancy of psychiatric testimony since the Wisconsin Supreme Court did not deal directly with the relevancy of such evidence to prove lack of capacity to form intent.

[18] *But see Curl v. State, supra* note 3, at 485, 162 N.W.2d at 83 (mental abnormality not amounting to legal insanity is not a "relevant factor in the determination of guilt. . . .") Examination of the *Curl* opinion convinces us that the Wisconsin objections to psychiatric testimony relate to the competence of the evidence and public policy considerations rather than the "relevance" of such evidence. We shall discuss the competency of psychiatric evidence and the state's policy justifications below.

for excluding psychiatric evidence on the intent issue was a lack of belief in the ability of psychiatry to define the degree of mental abnormality less than insanity. 40 Wis.2d at 485-86, 162 N.W.2d at 83. In response to the State's argument, we first question the validity of a system which views psychiatric testimony as trustworthy evidence as to whether a person is mentally capable of appreciating the wrongfulness of his conduct but untrustworthy to express an opinion regarding a person's mental capacity to form specific intent to kill when such testimony is the only relevant evidence available.[19] More importantly, however, we interpret *Curl v. State, supra,* as stating that the true reason for excluding psychiatric evidence on the issue of intent in Wisconsin courts is the fear that persons who are legally sane will escape punishment. 40 Wis.2d at 485-86, 162 N.W.2d at 83. This is more of a justification for excluding competent evidence than a reason why the evidence is incompetent.

The best indication that Wisconsin views psychiatric testimony as competent evidence is its use in other parts of the criminal proceeding. It is admitted on the question of insanity during the second stage of a bifurcated trial. *See* cases cited note 3 *supra.* Psychiatric testimony is also used to determine if the accused has the capacity to stand trial. *State ex rel. Haskins v. Dodge County Court, supra;* Wis. Stats. § 971.14 (1975). Finally, psychiatric diagnosis satisfies the general test for admissibility of scientific evidence since it is "sufficiently

[19] *See* note 13 *supra.* The statement in *United States v. Brawner, supra* note 12 at 999 is particularly relevant here:

> Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.

established to have gained general acceptance in the particular field to which it belongs." *Frye v. United States*, 293 Fed. 1013, 1014 (D.C. Cir. 1923). *See also Watson v. State*, 64 Wis.2d 264, 272-74, 219 N.W.2d 398, 402-03 (1974); *State v. Stanislawski*, 62 Wis.2d 730, 736-41, 216 N.W.2d 8, 11-13 (1974). Thus, we find that psychiatric testimony is generally considered competent evidence in Wisconsin.

C. State Justifications.

While the right of a defendant to present relevant and competent evidence is not absolute and may "bow to accommodate other legitimate interests in the criminal trial process," the Supreme Court in *Chambers v. Mississippi*, *supra*, required that any competing interest be "closely examined." 410 U.S. at 295. Thus, our third step is to determine whether Wisconsin's justifications for excluding psychiatric testimony on the issue of specific intent withstand close scrutiny.

The State has suggested two main justifications for the rule excluding psychiatric testimony on the issue of intent.[20] The first, as noted above, is the fear that admitting psychiatric testimony to disprove specific intent may cause judges and juries to find legally sane defendants not guilty and, consequently, "guilty" persons will be absolved of criminal responsibility for mental abnormalities not amounting to insanity.[21] Whatever validity this argument might have when a finding of no intent

[20] *See* Wisconsin Note, *supra* note 6 at 631-39.

[21] *See State v. Hebard*, *supra* note 3 at 418-19, 184 N.W.2d at 162. The *Hebard* opinion makes clear that despite its label of "*not guilty* by reason of mental disease or defect," a finding of legal insanity in Wisconsin actually means "*guilty* but excused." *Id.* at 420, 174 N.W.2d at 163. By confining this "diminished responsibility" status to those legally insane, Wisconsin can ensure that those defendants are subject to some form of commitment. Wis. Stat. § 971.17 (1975). The obvious difficulty is that the defendant is found guilty of first-degree murder without being given a full opportunity to disprove the specific intent element of the crime.

would result in no criminal responsibility, it is unpersuasive in the present case where the testimony was offered only to show that a second-degree murder conviction was proper. We expressly leave open the question of whether the State's fear of the "guilty" going free is sufficient justification for excluding psychiatric testimony on the issue of capacity to form intent when there is no lesser included crime of which, absent specific intent, a defendant would be guilty.[22]

The second justification for excluding psychiatric testimony on the question of the degree of intent is that the exclusion ensures the integrity of Wisconsin's bifurcated trial system. However, confining ourselves to the facts of this case, the petitioner withdrew his plea of not guilty by reason of mental disease or defect and, consequently, there was no second trial of that issue. Thus, the State's concern that admission of psychiatric testimony during the guilt portion of trial would result in duplication of evidence and eliminate the need for a bifurcated trial, *State v. Hebard*, *supra*, note 3 at 421-22, 184 N.W.2d at 163-64, is not applicable here. Also not involved is the fear that the petitioner's fifth amendment rights would be jeopardized if incriminating statements given during a pre-trial psychiatric examination were used by the prosecution at the guilt phase of trial. *State ex rel. LaFollette v. Raskin*, *supra* note 6 at 623, 150 N.W.2d at 326. In this case, petitioner admitted the act and argued only that he did not have the requisite specific intent for first-degree murder.

V.

Having found that petitioner's rights were violated, we must address the State's final argument that any

[22] *See, e.g. People v. Noah*, 5 Cal. 3d 469, 477-78, 487 P.2d 1009, 1014-15, 96 Cal. Rptr. 441, 446-47 (1971) (psychiatric testimony may disprove specific intent only); *Schwickrath v. People*, 159 Colo. 390, 411 P.2d 961 (1966) (same); Colo. Rev. Stat. § 18-1-803 (1975) (same); *but see* Arenella, *supra* note 8 at 832 n.25. (psychiatric explanations of diminished capacity should apply equally to disprove specific intent and general intent).

error which occurred was harmless and a new trial is unnecessary.[23] The State maintains that petitioner's offer of proof at trial, that petitioner was an "antisocial personality or a psychopath," does not describe a mental abnormality which would render him incapable of forming specific intent to kill. Also, the State points to the petitioner's actions and statements the night of the crime as overwhelming proof of his specific intent.

To accept the State's argument, we must find the error to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). We are not prepared to say, as a matter of law, that the psychiatric testimony offered could not have proven that the petitioner was incapable of forming specific intent. *See Henderson v. Morgan*, 426 U.S. 637, 647 (1976).[24]

VI.

In conclusion, we emphasize first what we have not done. We have not sought to impose a "diminished responsibility" defense for emotional problems upon Wisconsin. The fashioning of such affirmative defenses involves the type of "subtle balancing of society's interests against those of the accused [which has] been left to the legislative branch." *Patterson v. New York*, *supra* at 210. Nor have we attempted to further "constitutionalize" the law of evidence by constructing a constitutional right to introduce psychiatric testimony.

[23] The State confines its harmless error argument to the assumption that only the right to present evidence was violated. It does not claim that setting up a conclusive presumption, as discussed in Part III *supra*, was harmless error.

[24] We note that if, after a hearing, the state trial judge is convinced that the particular psychiatric testimony to be offered to negate specific intent is not "grounded in sufficient scientific support to warrant use in the courtroom," then it may be permissible to exclude that evidence. *United States v. Brawner*, *supra* at 1002 & n. 75. *See also United States v. Bennett*, 539 F.2d 45, 53 (10th Cir. 1976) (vague scientific reasons offered as justification may be rejected); *United States v. Demma*, *supra* at 986.

See Chambers v. Mississippi, *supra* at 308 (Rehnquist, J., dissenting). What we have done is to recognize that a state may not relieve the prosecution of its duty to prove all elements of the crime charged beyond a reasonable doubt by improper use of presumptions. We have also recognized the due process right of the defendant to present relevant and competent evidence in the absence of a valid state justification for excluding such evidence. Upon the particular facts of this case, we find Wisconsin's justifications to be inapplicable.

For the reasons stated above, the order of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit